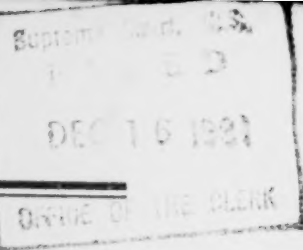


(2)
No. 91-556



In the Supreme Court of the United States

OCTOBER TERM, 1991

JANA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

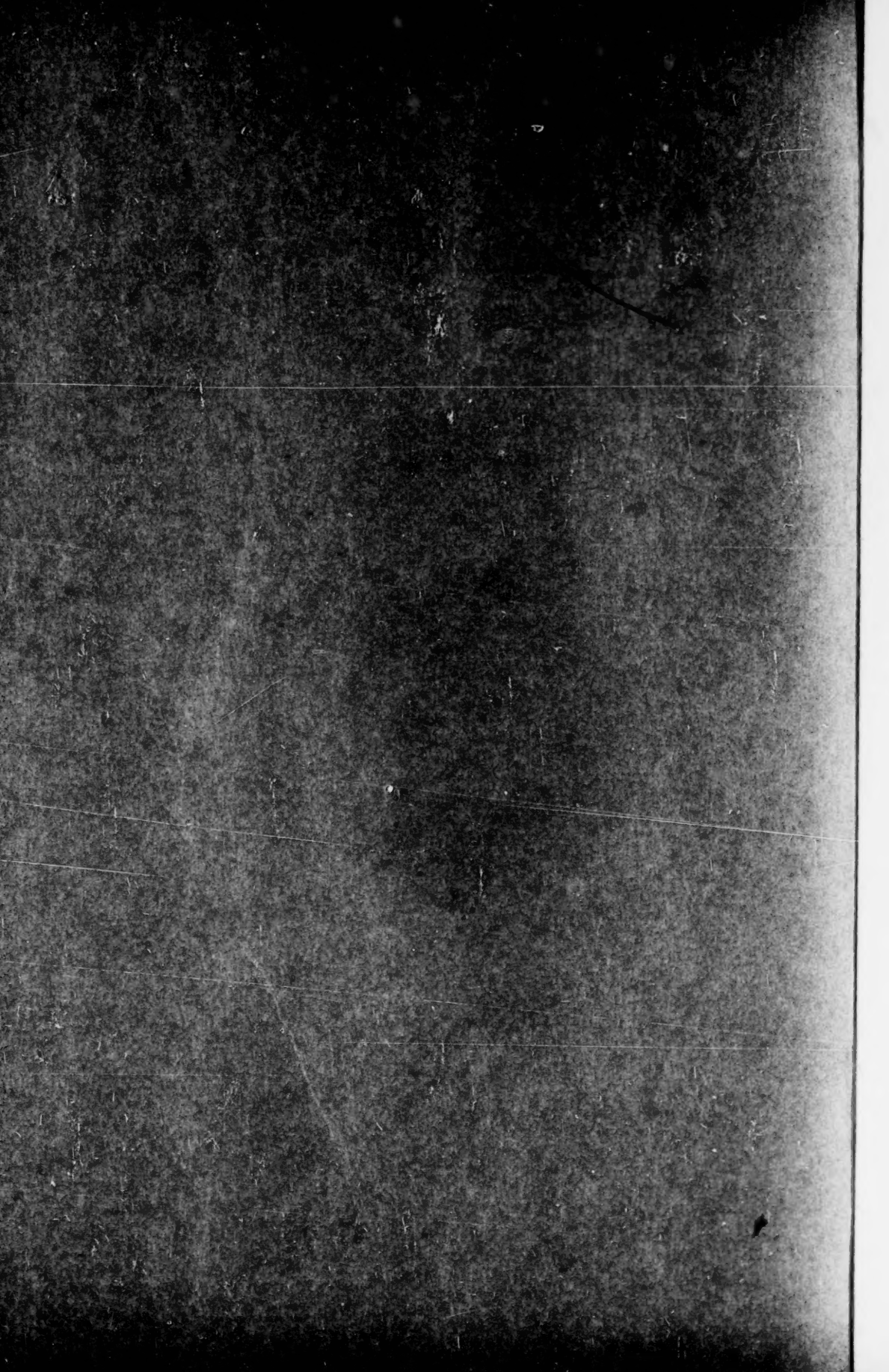
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, a government contractor, was required to retain for three years its "labor recap sheets" showing labor performed on government contracts, which documents were the basis for payments by the government on the contracts.

2. Whether the government may recoup from petitioner amounts paid for labor claimed to be performed under contract, where a subsequent audit reveals that petitioner failed to comply with a contractual requirement under the Armed Services Procurement Regulations that it retain the labor recap sheets documenting the work performed.

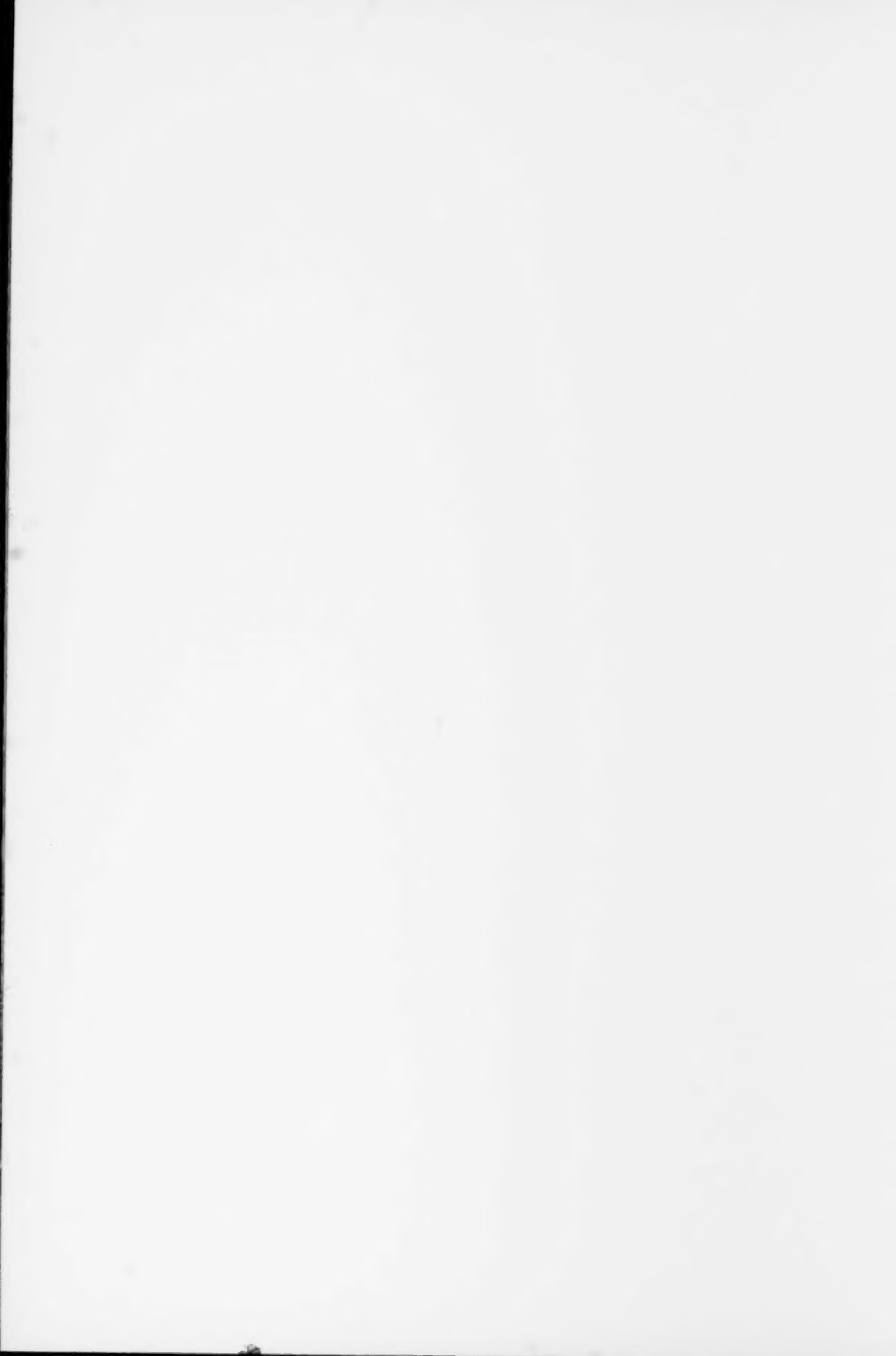


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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-15a) is reported at 936 F.2d 1265. The decision of the Claims Court (Pet. App. 17a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on June 13, 1991. A petition for rehearing was denied on July 9, 1991 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on October 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into two contracts with the Navy in 1975 and 1976 to perform work on Navy technical manuals. Pet. App. 37a-38a. The contracts were "time and materials contracts" that determined the contract price primarily by multiplying the number of employee hours worked by the fixed hourly rates specified in the contracts. *Id.* at 3a. Under such a contract, the government does not verify the actual number of hours worked by a contractor until the contract is audited after performance is complete. *Ibid.*; C.A. App. 99-104.

Each contract contained the standard clauses required by the Armed Services Procurement Regulations (ASPR). See ASPR 7-104.41, 32 C.F.R. 7-104.41 (1975). Under ASPR 7-104.41, see 32 C.F.R. § VII, pt. 1, para. 7-104.41 (1975) (the Audit clause), the government is entitled to conduct an audit of a contractor's records, and the contractor is required to maintain "documents * * * sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred * * * for the performance of this contract."¹ The Audit clause

¹ The relevant portions of ASPR 7-104.41 provide:

Audit by Department of Defense.

(a) Insert the following clause in all contracts other than contracts entered into by formal advertising which are not expected to exceed \$100,000.

AUDIT BY DEPARTMENT OF DEFENSE (1975 JUN)

(a) *General.* The Contracting Officer or his representatives shall have the audit and inspection rights described in the applicable paragraphs (b), (c) and (d) below.

(b) *Examination of Costs.* If this is a cost reimbursement type, incentive, time and materials, labor hour, or price redeterminable contract, or any combination thereof,

also required petitioner to maintain these documents "until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M of the [ASPR]." *Ibid.*

As described by the court of appeals, petitioner's accounting system consisted of four basic documents:

Each JANA employee filled out "time cards," listing time worked on various jobs. The time each employee recorded for a given job—such as one of the contracts at issue here—was then transferred to a "labor recap sheet." The labor recap sheets for each of these contracts thus showed the time each employee spent working on just that contract during a given month. The time recorded on the labor recap sheets was then converted to a dollar value and recorded on the "job control register." Finally, the contents of the job control register were transferred to the "invoices" sent to the government for payment under each contract.

the Contractor shall maintain, and the Contracting Officer or his representatives shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. * * *.

* * * * *

(e) *Availability.* The materials described in (b), (c) and (d) above shall be made available at the office of the Contractor, at all reasonable times, for inspection, audit, or reproduction, until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M of the Armed Services Procurement Regulation, and for such longer period, if any, as is required by applicable statute, or by other clauses of this contract, or by (1) and (2) below * * *.

Pet. App. 4a-5a. The technical representative of the contracting officer provided a certification with each invoice that the hours recorded and the services described were satisfactorily performed. *Id.* at 38a-39a. It is undisputed, however, that these certifications pertained only to the quality of the work, not to whether the hours billed were correct. *Id.* at 14a; C.A. App. 30.

Petitioner submitted invoices for labor on the two Navy contracts totalling \$3,684,884. Pet. App. 40a-41a. The government made final payment under the contracts on January 20, 1981. *Id.* at 40a. On July 5, 1983, the Defense Contract Audit Agency (DCAA) commenced an audit of both contracts. *Ibid.* The audit revealed that the hours stated on petitioner's job control register and invoices exceeded the hours shown on the labor recap sheets and time cards made available to the auditors. *Id.* at 5a. Petitioner's records accordingly failed to substantiate \$563,786 of its invoice charges for labor. *Id.* at 40a-41a. DCAA's audit reported the \$563,786 as an overpayment, and the contracting officer requested that petitioner repay this amount. *Id.* at 41a.

2. Petitioner sought review of the DCAA's decision under the Contract Disputes Act of 1978, 41 U.S.C. 609(a), by filing this action in the Claims Court. The government counterclaimed for the \$563,786. Pet. App. 38a. The Claims Court entered judgment for petitioner. *Id.* at 30a-31a. It found that petitioner "is not now and was not in July 1983 [when the audit began] able to produce the records * * * which substantiated all of the charges that were reflected on invoices that were submitted and paid." *Id.* at 19a. Nevertheless, the court held that the gov-

ernment had not met its burden of proving that an overpayment had occurred. *Id.* at 17a-18a. Without making a definitive finding on this point, the court speculated that "most likely" these records had been lost. *Id.* at 21a-22a. Relying on ASPR App. M-101(b)(2), 32 C.F.R. App. M-101(b)(2) (1979), the court held that petitioner was under no obligation to retain the labor recap sheets until the July 1983 date when the government's audit began, but only until March 31, 1983, two years after the end of petitioner's fiscal year in which its final charges under the contracts had been made.² Pet. App. 22a, 40a. The court based that holding upon its legal conclusion that petitioner's "labor recap sheets" are "labor cost distribution cards or equivalent documentation," which the regulations require to be retained only for two years, rather than "documents which detail the material or services billed on the related invoices"—which must be retained for at least three years. *Id.* at 24a; see note 5, *infra*; ASPR App. M-201.1(i) and (vi), 32 C.F.R. App. M-201.1(i) and (vi).³

² Petitioner was also unable to produce employee time cards to substantiate payments under the contracts. Pet. App. 40a. It is undisputed (Pet. 8), however, that the required retention period for these records is two years. ASPR App. M-201.1(vi), M-201.2(ii), 32 C.F.R. App. M-201.1(vi), M-201.2(ii) (1979).

³ The relevant portion of that regulation provides:

M-201.1 *Financial and Cost Accounting Records*. Retain for the following periods, calculated as provided in M-101(b)(2):

(i) accounts receivable invoices, adjustments to the accounts, invoice registers, shipping orders, carrier freight bills, or other documents which detail the

3. The Federal Circuit reversed and directed entry of judgment for the government. Pet. App. 1a-15a. The court of appeals first found that the "Submission of Invoices" clause in each contract provided that petitioner "would only be paid for hours that can be substantiated." The court explained that those clauses "put [petitioner] on notice that no payments were final until the contracts had been audited, or the time for auditing had expired, and that at least until then, [petitioner] could be required to produce records substantiating its invoices." *Id.* at 5a, 6a.⁴ Relying upon the Audit clause included in each contract (see pp. 2-3, note 1, *supra*), the court of appeals held that petitioner "was thus under a specific contractual duty to maintain records supporting the accuracy of its charges for the period specified." Pet. App. 7a.

The Federal Circuit also ruled, contrary to the Claims Court's holding, that the labor recap sheets were not "labor cost distribution cards or equivalent documentation" required to be retained for two years under ASPR App. M-201.1(vi). Pet. App. 10a. That category applied to the employee time cards, and the

material or services billed on the related invoices—
RETAIN 4 YEARS.

* * * * *

(vi) labor cost distribution cards or equivalent documentation—RETAIN 2 YEARS.

⁴ The "Submission of Invoices" clause provides:

Invoice submissions for payment shall be made based on the actual hours worked. * * * The contractor may be required to justify invoice billings as the Government reserves the right to audit task efforts, employee time cards, etc. * * *.

See Pet. App. 5a.

labor recap sheets contained different information and had a different function than the time cards, the court observed. *Ibid.* The labor recap sheets were held to “fit within the literal terms of [ASPR App. M-201.1(i), that is,] ‘documents which detail the material or services billed on the related invoices,’ ” *ibid.*, which are required to be retained for three years.⁵ The court also observed that a longer retention period for the labor recap sheets was warranted because they were less voluminous, and thus easier to store, than the employee time cards. *Ibid.*

The court of appeals concluded that the audits by the DCAA were conducted within the three-year period in which petitioner was required to retain the labor recap sheets supporting the invoices it submitted to the government. Pet. App. 11a. It found that, despite this obligation, petitioner was unable to produce records that supported all the payments made by the government. *Ibid.* Therefore, the court concluded, petitioner was liable to the government for an overpayment representing the undocumented labor charges. *Ibid.*⁶

⁵ Although Appendix M-201.1(i) specifies a retention period of four years for these documents, the court noted (Pet. App. 11a) that ASPR 7-401.41(e) and the Audit clause reduce that period to three years by providing that records shall be retained “until the expiration of three years from the date of final payment under this contract or such lesser time specified in Appendix M.”

⁶ The Federal Circuit also rejected petitioner’s claims of laches and estoppel. Pet. App. 11a-14a. Petitioner does not challenge those holdings in this Court.

ARGUMENT

Congress has conferred exclusive jurisdiction upon the Federal Circuit to review disputes arising under the Contract Disputes Act of 1978, 41 U.S.C. 607(g),⁷ thereby establishing it as the specialized and expert tribunal to resolve such issues. The Federal Circuit's resolution of the issues presented by petitioner rests upon a straightforward application of standard contract clauses, required by the ASPR,⁸ to the undisputed facts of this case. The court of appeals correctly decided this case, and no further review is warranted.

1. In holding that petitioner was required to retain its labor recap sheets for three, not two, years, the court of appeals correctly interpreted the regulations describing the periods for which records must be retained on government contracts. As the court recognized, the labor recap sheets represent a collation of the hours worked by petitioner's employees on each government contract—data that the contractor converted to a dollar value and transferred to the “invoices” sent to the government for payment. Pet. App. 4a-5a. The recap sheets therefore fall within the category of “documents which detail the material or services billed on the related invoices,” see ASPR App. M-201.1(i), which must be retained for three

⁷ The sole exception to this grant of jurisdiction provides that decisions of the Tennessee Valley Authority board of contract appeals are reviewable in the district courts. 41 U.S.C. 607(g)(2).

⁸ The ASPR provisions applicable here were superseded in 1984 by substantially identical provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. 4.700-4.706. The ASPR regulations continue to apply to contracts entered into before the FAR became effective. See Pet. App. 6a.

years. Petitioner points to no authority supporting its contention that the court misclassified these documents under the pertinent contract regulations. That issue does not merit this Court's attention.⁹

2. The court of appeals was also correct to hold that, under the Submission of Invoices clause (see p. 6, note 4, *supra*), petitioner was entitled to be paid for time-and-materials contracts "based on the actual hours worked." Pet. App. 5a. The clause also states that "[t]he contractor may be required to justify invoice billings as the Government reserves the right to audit task efforts, employee time cards, etc." *Ibid*. The Audit clause expressly requires the contractor to maintain its accounting records for the prescribed period. As the court of appeals concluded, the language of the contract clauses, taken together, obligates the government to pay only "for hours which were actually worked and which could be verified on audits." *Id.* at 11a. It is undisputed that, when audited within the three-year period, petitioner could justify only \$3,121,098 of its \$3,684,884 invoice bill-

⁹ Petitioner implies that the government is, in effect, attempting to extend the two-year retention requirement for time cards to three years based on petitioner's wholly voluntary decision to collate the time card data on labor recap sheets, rather than to rely on time cards alone. Pet. 21 n.10. This argument is unavailing. Although neither the contract nor the regulations stipulate the form in which records must be kept, they do set forth the period for which a contractor is required to retain the types of records it generates. Petitioner elected to keep records of time worked on government contracts in the form of labor recap sheets—records for which the retention period under the contract is three years. Petitioner's failure to retain the sheets documenting all charges constituted a breach of the contract requirement that it retain such records, making it liable to the government for the overpayment of undocumented charges.

ings. *Id.* at 40a-41a. Petitioner was accordingly liable to the government for the \$563,786 overpayment that was not supported by petitioner's records.

3. Contrary to petitioner's argument (Pet. 11-16), the court below did not create an irrebutable presumption that petitioner failed to incur labor costs not reflected in its records. Rather, the court held only that the contracts did not entitle petitioner to retain payments for the portion of labor costs that it could not support by adequate documentation, regardless of whether those costs were incurred. In this regard, the case is analogous to *United States v. Locke*, 471 U.S. 84 (1985), where this Court reversed a lower court's holding that a failure to comply with a mining claim filing requirement constituted an invalid irrebuttable presumption that the claimant intended to abandon its claim. Rejecting that analysis, this Court held that enforcement of the applicable filing requirement "presume[d] nothing about a claimant's actual intent," but, instead, simply meant that all claims that were not timely refiled were forfeited. 471 U.S. at 103. Similarly, here, the court of appeals made no presumption or finding regarding petitioner's actual costs. Rather, it held that the express terms of the contracts obligated the government to pay only for billings backed up by records that petitioner had agreed to retain.

4. Petitioner contends (Pet. 16-19) that the court of appeals worked an unlawful forfeiture in not permitting petitioner to show that it actually incurred costs and conferred benefits upon the government in excess of the amount it could substantiate with records made available to the auditor. There was no "forfeiture" here, however, because the contract between the parties conditioned payment on the govern-

ment's ability to verify costs through an audit of required records.

The cases on which petitioner relies (Pet. 16-19) are not to the contrary. The express payment provisions of the time and materials contracts at issue here distinguish this case from all but one of the cases petitioner cites, in which *quantum meruit* recovery was allowed despite the invalidity of a contract or a contractor's record-keeping failures. See *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986) (*quantum meruit* recovery allowed where contract invalid); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288 (1990) (same); *Delco Electronics Corp. v. United States*, 17 Cl. Ct. 302 (1989) (reasonable equitable adjustment permitted for change in contract), *aff'd* without opinion, 909 F.2d 1495 (Fed. Cir. 1990); *National League of Cuban American Community-Based Centers*, GSBCA No. 9157-ED, 91-1 B.C.A. (CCH) ¶ 23,513 (1990) (*quantum meruit* allowed under cost-reimbursable contract where government instructed contractor to destroy records); *Harrison Western Franki Denys*, ENG BCA No. 5577, 90-3 B.C.A. (CCH) ¶ 22,991 (1990) (reasonable adjustment based upon extrapolation from available records allowed for change in fixed-price contract).

The remaining case cited by petitioner, *Loyal E. Campbell*, GSBCA No. 5954, 82-2 B.C.A. (CCH) ¶ 15,916, *aff'd* on reconsideration, 82-2 B.C.A. (CCH) ¶ 16,038 (1982), is fully consistent with the decision below. In that case, the contractor's faulty record-keeping prevented it from substantiating any of its \$70,148 invoices, but the government auditor calculated that only \$17,304 of the billings had been excessive, and the government sought to recover only

that amount. The Board of Contract Appeals held that initial payments to a contractor under a time and materials contract are provisional and subject to recapture if the contractor cannot substantiate its invoices with the records required by the contract. Although the Board made clear that the breach of the record-keeping requirements excused the government from making *any* unsubstantiated payment under the contract, it allowed the contractor to retain the amount that the auditor had determined was not excessive as restitution for the benefit that the contractor had conferred upon the government. The Board held, however, that the contractor was estopped by its record-keeping breach from arguing, as petitioner would argue in this case, that it actually worked all of the hours billed on its invoices.

This case is unlike *Campbell* in two important respects: first, petitioner here lacked record verification for only a small portion of its putative labor costs, and thus did not stand to lose all payment under the contract as a result of its breach. More importantly, however, the government auditor here did not determine, as did the auditor in *Campbell*, that labor costs unsupported by required records were actually incurred, nor did the government agree to excuse repayment of certain costs. On the facts of the instant case, the Board's decision in *Campbell* actually supports the result below in making clear that a contractor's breach of its record-keeping obligations prevents it from contesting the amount of the overpayment determined by a government audit.

Finally, even conceding that a time and materials contractor might be entitled to restitution for a benefit to the government in the absence of required records, and that the contractor would be permitted to

prove the amount of benefit by extrinsic evidence, the decision below is still correct. Petitioner presented no evidence, and neither court below found, that its employees actually performed the work underlying the unsubstantiated labor charges to the government. Indeed, petitioner now seeks a remand to attempt to make such a showing. Pet. 19. Petitioner had a full opportunity at trial to prove that the costs for which it obtained reimbursement were actually incurred. Having failed to do so, it is entitled to no further relief.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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